

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>EUGENE M. HOHN</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 150,259 & 157,959
<b>TIONA TRUCK LINE, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>AMERICAN HOME ASSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the Award dated July 3, 1997, entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument in Topeka, Kansas, on November 14, 1997.

**APPEARANCES**

John J. Bryan of Topeka, Kansas, appeared for the claimant. John B. Rathmel of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

The Administrative Law Judge denied claimant's request for benefits after finding that claimant had presented a fraudulent claim. Claimant requested the Appeals Board to review the following issues:

- (1) What is the nature and extent of claimant's alleged injuries and disabilities?
- (2) Is claimant entitled to medical benefits, including unauthorized medical benefits?
- (3) Are the videotapes identified as respondent's exhibits four, five, and six at the regular hearing held on August 25, 1994, and the continuation of the regular hearing held on October 26, 1994, part of the evidentiary record?
- (4) Are the audiotapes identified as respondent's exhibits two and three at the regular hearing held on August 25, 1994, and the continuation of the regular hearing held on October 26, 1994, part of the evidentiary record?

**FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Claimant alleges he suffered two injuries on October 23, 1990, while working for the respondent. Claimant contends he is permanently and totally disabled as a result of hitting his head on an overhead door early in the morning on that date and sustaining a closed-head injury. He also alleges a foot injury as the result of being struck in the foot by a hose later that morning.
- (2) Claimant has exaggerated the effects of any injury he received on October 23, 1990. That conclusion is based upon comparing the videotape of claimant at the August 25, 1994, regular hearing and the manner in which claimant both walked and spoke as demonstrated by surveillance videotapes recorded on February 10, October 13, October 14, October 25, and October 26, 1993, and audiotapes recorded on October 26 and October 27, 1993. At the August 1994 regular hearing, claimant displayed a severe limp and extreme difficulty speaking. The surveillance videotapes demonstrated a slight limp at most and the audiotapes demonstrated essentially normal speech. Because of such extreme exaggeration, claimant's testimony and statements to physicians as to the effects of his alleged accidents lack all credibility.

(3) Claimant displays an infantile speech pattern. Despite normal radiological and neurological studies, Clyde L. Rousey, Ph.D., testified claimant's speech patterns were consistent with a disturbance in communication secondary to some sort of neurological disturbance, probably caused by the alleged closed-head injury. However, the Appeals Board finds that the opinions of board-certified psychiatrist Lee T. Weng, M.D., and speech and language pathologist Rosalind R. Scudder, Ph.D., are more persuasive. Dr. Weng testified that claimant was malingering. Dr. Scudder testified that the speech and language patterns claimant exhibited were neither consistent with nor the result of a closed-head injury. Further, Dr. Scudder testified that neither area for speech or language is located in the brain's frontal lobe and, therefore, walking into an overhead door as claimant alleged could not have damaged those areas.

(4) Board-certified orthopedic surgeon Edward J. Prostic, M.D., examined claimant in June 1994. Claimant reported to Dr. Prostic difficulties walking and standing and loss of right arm strength. During the clinical examination, the doctor found no physical explanation for claimant's abnormal gait and found claimant's right leg complaints out of proportion to that anticipated. He found no objective findings on physical examination of the right leg injury. Although Dr. Prostic found degenerative changes in the cervical spine, those changes were to a degree not unexpected in a person of claimant's age. The doctor also failed to find any clinical evidence for loss of right arm strength and failed to find evidence of atrophy or obvious neurologic deficit.

(5) Dr. Prostic testified if claimant were malingering he would expect to see substantially different gait patterns from time to time. As indicated above, claimant did display substantially different gait patterns. At times claimant acted as if he were required to lean against the wall to walk but at other times walked rather normally with a slight limp at most.

#### **CONCLUSIONS OF LAW**

(1) The Appeals Board finds claimant has failed to prove by a preponderance of the evidence that it is more probably true than not that he sustained anything more than an abrasion to the forehead as the result of the two alleged October 23, 1990, accidents. Therefore, claimant's request for permanent partial disability benefits is denied.

The Appeals Board also finds that the Workers Compensation Fund should reimburse respondent for the temporary total disability and medical benefits paid in this claim, except for the initial treatment administered at the hospital emergency room on October 23, 1990, as the evidence fails to establish that the subsequent medical treatment was necessary.

(2) Claimant's request for medical benefits is denied. However, the respondent is ordered to pay for the treatment administered claimant at the hospital emergency room on October 23, 1990, for the abrasion to the forehead. Claimant is also entitled to unauthorized medical benefits in the sum of \$350 for the accident which resulted in the forehead abrasion.

(3) Claimant objected to certain surveillance videotapes being considered as part of the evidentiary record. The videotapes identified as respondent's exhibits four, five, and six at the hearings held on August 25, 1994, and October 26, 1994, are part of the evidentiary record. After a discussion with counsel at the October 1994 hearing, Administrative Law Judge James R. Ward admitted those tapes into evidence. The following statements were made at that hearing:

MR. RATHMEL: Yes, Your Honor, thank you. I believe that Mr. Bryan and I have come to a stipulation with regard to some evidence. We've been in a discussion just prior to the opening of the record. I have three videotapes that have been produced to Mr. Bryan under your order after our telephonic--

JUDGE WARD: Conference call.

MR. RATHMEL: Conference call, exactly. The three videotapes have been marked Respondent's Exhibits 4, 5 and 6 from the 8/25/94 commencement of this hearing. I believe that we've reached stipulation as to the foundation of these videotapes and that Mr.-- into evidence and that they can come into evidence, **but for convenience of the court and counsel** [emphasis added], that Mr. Bryan and I will sit together and create an edited version of the tapes which show the action that both of us want. Is that correct?

MR. BRYAN: Well, in general, yes. What I'm saying is I'll waive the foundation on the, any part of that videotape that you want to use and you do for any part that I would want to use and I assume you'll prepare a version, an edited version that you'll want to use and send it to me, then I can go through it and if I want to add, I can add. I just can't subtract and if I want to have testimony later explaining or whatever the part that you're using, we can do so or disputing its being an accurate representation. In other words, if because of camera angles or the shots that were selected versus something else, we're not waiving any of those rights. **We're agreeing that they can be admitted into evidence, but the weight of it we can attack** [emphasis added].

JUDGE WARD: What's the numbers of those?

MR. RATHMEL: They were Respondent's Exhibits 4, 5, 6 from the 8/25/94 hearing, Your Honor.

JUDGE WARD: **Okay, they'll be received** [emphasis added] and then if I understand you correctly, you're going to condense those and introduce at a later date a shortened, more pertinent version.

MR. BRYAN: Yeah, a single tape that would-- right.

MR. RATHMEL: That's my understanding, Your Honor.

JUDGE WARD: Okay.

Although counsel represented they would jointly prepare an edited version, that task was not completed. However, the failure to produce an edited tape for the fact-finder's convenience should not prevent the unedited copies from being considered.

(4) Claimant objected to audiotapes allegedly demonstrating claimant's conversational speech on October 26 and October 27, 1993, being included in the evidentiary record. The Appeals Board finds the respondent's counsel established a proper foundation for the audiotapes and the Administrative Law Judge later properly admitted the tapes into evidence. Respondent's witness, Stephen Koerber, testified the audiotapes contained a true and accurate representation of the conversation he had with claimant.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated July 3, 1997, entered by Administrative Law Judge Bryce D. Benedict should be, and hereby is, modified. Claimant's request for workers compensation benefits is denied except for the medical treatment administered claimant in the hospital emergency room on October 23, 1990, and unauthorized medical up to the statutory maximum of \$350; that the Workers Compensation Fund is ordered to either pay or reimburse the respondent for all benefits and administrative expenses associated with these claims with the exception of the October 23, 1990, medical treatment and unauthorized medical benefit awarded claimant.

In all other respects, the Award is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     John J. Bryan, Topeka, KS  
       John B. Rathmel, Overland Park, KS  
       Bryce D. Benedict, Administrative Law Judge  
       Philip S. Harness, Director